

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

FRIDAY, THE 2ND JUNE 2006 / 12TH JYAISHTA, 1928

Crl.MC.No. 1183 of 2005()

CRRP.51/2003 of ADDL.SESIONS COURT, KOZHIKODE
MC.1/2002 of JUDL.MAGISTRATE OF FIRST CLASS, NADAPURAM
.....

PETITIONER: APPELLANT/ACCUSED.

T.K.MOIDU HAJI, S/O.ABDULLA,
AGED 72 YEARS, PADINHARATHARA,
MUNDAKUTTI P.O., WYNAD DISTRICT.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS:

1. KONNAPALARKANDY MARIYAM,
D/O.MOOSA, KUNNUMMAL AMSOM DESOM,
VADAKARA TALUK, KOZHIKODE DISTRICT.
2. STATE REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 BY ADV. SRI.K.RAKESH ROSHAN
SMT.THUSHARA.V
R2 BY P.P. SHRI K.J. GEORGE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
ON 02/06/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

A. K. Basheer, J.

Cr1.M.C.No.1183 Of 2005

Dated this the 2nd day of June, 2006.

O R D E R

Two interesting questions have primarily arisen for consideration in this petition under Section 482 of the Code of Criminal Procedure filed by a former husband who has suffered an order under Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986 (for short 'the Act').

(i) Is consummation of marriage sine-qua-non for entitlement of reasonable and fair provision and maintenance to a divorced Muslim woman?

(ii) Is the court debarred from entertaining an application under Section 3 of the Act before expiry of the iddat period?

2. The above questions have cropped up in the following facts and circumstances:

3. The respondent herein who is the divorced wife of the petitioner, initiated proceedings under Section 3 of the Act alleging inter-alia that she had been denied the dues payable under the Act after her divorce. She also claimed that the petitioner had not returned her gold ornaments and cash given to her by her parents and relatives at the time of marriage. It was also averred in the petition that her former husband had wilfully refused to pay her 'Mahr' which was promised at the time of marriage. A total sum of Rs.2,42,786/- was claimed by the respondent under various heads, including maintenance during the period of Iddat.

4. In the counter statement petitioner contended that he had married the respondent in the year 1997 after the death of his first wife. According to the petitioner, he decided to marry the respondent since he wanted company in his old age. He was 73 at the time of marriage. But soon after the marriage, he realised that the respondent was incapable of having sexual intercourse since she did not possess any of the anatomical or physiological attributes of a female, though in outward appearance she looked like a woman. Petitioner asserted that the respondent was not a woman at all and therefore the marriage was not consummated. When the respondent realised that the petitioner had detected this deformity in her, she had left the matrimonial home after discussing the matter with him. In short, while resisting the claim made by the respondent under Section 3 of the Act, it was contended by the petitioner that the respondent not being a woman and the marriage between him and her not having been consummated, she was not entitled to invoke the above statutory provision.

5. After considering the oral and documentary evidence and the rival contentions of the parties, the trial court held that the respondent was entitled to get a sum of Rs.8,368/- towards the value of two sovereigns of gold and Rs.4,500/- towards maintenance during the iddat period. It was further held that the petitioner was liable to return a sum of Rs.15,000/- received by him at the time of marriage. He was also directed to pay a sum of Rs.75,600/- towards fair and reasonable provision and maintenance of the respondent. Thus, as against a total

claim of Rs.2,42,786/-, the trial court awarded a sum of Rs.1,03,468/- with 6% interest per annum from the date of order till realisation.

6. The above order was challenged by the petitioner before the Sessions Court which modified and reduced the amount awarded by the trial court. The Sessions Court found that the respondent was entitled to get Rs.3,000/- as maintenance during “iddat” period and a sum of Rs.60,000/- as fair and reasonable provision and maintenance. The amounts awarded by the trial court under the other heads were disallowed.

7. It is vehemently contended by Shri T.G. Rajendran, learned counsel for the petitioner that the respondent was not entitled to get the benefits of the provisions of the Act at all, since she did not come within the definition of “divorced woman” under Section 2(a) of the Act. The attempt of the learned counsel appears to be, to contend for the position, that the respondent not being a woman, she would not come within the purview of the Act. It is contended that the respondent did not have any of the sexual attributes of a woman, though she looked like one in outward physical appearance. Obviously, therefore, the petitioner could not have any sexual relationship with the respondent. Resultantly, there was no consummation of the marriage. Learned counsel contends that only a woman can be a 'wife' and naturally therefore only a divorced 'wife' can claim maintenance from her former husband.

8. It is pertinent to note that the marital relationship between the petitioner

and the respondent had admittedly lasted for more than four years. It is beyond controversy that the petitioner had divorced the respondent in October 2001 as revealed from Ext.P3 communication sent by him. The respondent had specifically averred in the petition before the trial court that she was sent out of the matrimonial home in November 1999. Though the petitioner had asserted in the counter statement that the respondent had not lived with him for more than six months, it was later stated by him that the respondent had left the matrimonial home about two years ago. Thus, it is clear from the pleadings that the respondent had lived with the petitioner at least for almost three years as contended by her. It was admitted by the petitioner when he was examined as CPW.1 that he had never taken the respondent to a doctor. It was also admitted by him that there was no “problem” during the period when he and the respondent lived together. In this context, it may be pertinent to note that the petitioner had of course made a belated attempt to send the respondent for a medical examination. But the trial court did not allow the prayer. Though the petitioner had challenged the above order before this court earlier, he could not get a favourable result.

9. I have referred to the above aspects of the case to consider the question whether consummation of marriage can be presumed applying the principle of “valid retirement” (khilwat-us-sahiha) under Mahomedan Law.

10. In Mulla's Principles of Mahomedan Law, it has been stated that “when the husband and wife are alone together under circumstances which present

no legal, moral or physical impediment to marital intercourse, they are said to be in “valid retirement” (khilwat-us-sahiha). A valid retirement in Sunni law has the same legal effect as actual consummation as regards dower (Sections 267, 336(2)), the establishment of paternity, the observance of iddat (section 257), wife's maintenance during iddat (section 279), ...”

11. The above excerpt unambiguously admits of presumption of consummation if there is a “valid retirement”. If the husband and wife cohabit or live together without there being any other circumstance inhibiting or preventing their physical union, it can be presumed, unless otherwise proved, that the marriage had been consummated. In the absence of any contra evidence adduced by the petitioner, the courts below were, in my view, justified in repelling the contention raised by the petitioner that the marriage had not been consummated.

12. As regards the question of maintainability of an application under Section 3 of the Act by a divorced Muslim woman even in the absence of consummation, there cannot be any room for doubt that a divorced woman can claim the benefits provided under the above provisions of the Act, irrespective of the fact whether there was consummation or not. In this context, it will be profitable to refer to the relevant clauses of Section 3 of the Act:

“3. Mahr or other properties of Muslim woman to be given to her at the time of divorce.--

(1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to--

(a) a reasonable and fair provision and maintenance to be made

and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children`;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause(d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that--

(a) her husband having sufficient means has failed or neglected to make or pay her within the iddat period a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause(d) of sub-section (1) have not been delivered to her.

Make an order, within one month of the date of the filing of the application directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman:

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A perusal of the above provisions shows that a divorced woman shall be entitled to reasonable and fair provision and maintenance within the iddat period from her former husband apart from the dower and other dues or properties mentioned in

clause (d) of sub-section (1). Sub-section (2) of Section 3 enables the divorced woman, to make an application before the competent court for an order for payment of the statutory dues payable to her by her former husband. It is the admitted position that petitioner and respondent had lived together as husband and wife for almost three years, as is evident from the pleadings and evidence on record. Petitioner had no case that he had discharged the statutory liabilities as contemplated under the Act. The petitioner had never raised any issue regarding the absence of womanly attributes in the respondent or about her alleged inability to have sexual intercourse with him. That being the position, there cannot be any doubt that the respondent was entitled to make an application since she had satisfied the statutory requirements.

13. It is true that consummation of marriage may have relevance and significance in the matter of observance of iddat in the event of divorce. Under Section 257(2) iddat has been described “ as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by divorce, the duration of iddat, if the woman is subject to menstruation, is three courses; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by death, the

duration of the iddat is four months and ten days. If the woman is pregnant at the time, the iddat lasts for four months and ten days or until delivery, whichever period is longer. It is further provided in Section 257 that if the marriage is dissolved by death, the wife is bound to observe “iddat” whether the marriage was consummated or not. If the marriage was dissolved by divorce, she is bound to observe “iddat” only if the marriage was consummated; if there was no consummation, there is no iddat, and she is free to marry immediately.

14. The above provision does not mean or cannot, by any stretch of imagination, be interpreted to mean that the liability to pay maintenance by the husband to the divorced wife would cease if the woman is not obliged to observe iddat, because of non-consummation of marriage. The statutory liability to pay maintenance during the period of iddat is provided not only under Section 3, but it is also an obligation cast upon the husband in Section 279 under the Mahomedan Law. It is provided in the above clause that the wife is entitled to maintenance during the period of iddat after divorce. If the divorce was not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce. However, a widow is not entitled to maintenance during the period of iddat consequent upon her husband's death. Thus, it is clear not only from Section 3 of the Act, but also from Section 279 that a divorced woman is entitled to get maintenance during the period of iddat irrespective of the fact whether the marriage was consummated or not. More importantly, Section 3 of

the Act does not refer to consummation of the marriage at all in order to make the wife eligible to claim maintenance during iddat. In any view of the matter, I have no hesitation to hold that a divorced woman, whether the marriage was consummated or not, is entitled to claim maintenance during iddat apart from fair and reasonable provision towards future maintenance and also dower and other statutory dues in the event of her being divorced by the husband.

15. The other contention raised by the petitioner relates to the question whether an application under Section 3 can be entertained if it is filed before the expiry of the period of iddat. Learned counsel contends that a divorced woman will get a cause of action to file an application under Section 3 only if the husband has failed to pay the same before the expiry of the “iddat” period. In other words, the contention is that the divorced woman should wait and see if her former husband pays the dues before the expiry of the “iddat” period. She has to wait till the expiry of the period, and an application can be filed only after its expiry, it is contended. There is no rhyme or reason, leave alone any legal basis, for the above contention.

16. As noticed already, a divorced woman is entitled to maintenance during the period of iddat under Section 3 of the Act. It becomes payable by the husband the moment the divorce is effected. In other words, the obligation to pay maintenance during the period of iddat arises the moment divorce is effected. Undoubtedly, the Act is intended to provide ameliorative safeguards to protect the

rights of divorced muslim women. The provision to pay maintenance by the husband during the period of iddat has definitely got a salutary object. The legislative intent appears to be to ensure that a divorced woman is not left in the lurch during the period of iddat, especially since the divorced woman is supposed to remain in seclusion. She may not be in a position to move around. Even if she has an avocation in life, she may not be able to carry on with or pursue such job or avocation. It is therefore that the law has made it a mandatory obligation on the husband to see that the divorced woman is provided with adequate maintenance to look after herself especially during the 'iddat' period. It does not stand to reason that the divorced woman should be asked to wait for the expiry of the iddat period and then only approach the court seeking maintenance for that period. If such an interpretation is given, it will defeat the very object and purpose of the statutory provision. In this context, it may also be noticed that Section 3 makes it obligatory on the court to pass orders on the application for maintenance within one month from the date of receipt thereof. In any view of the matter, the contention raised by the petitioner that the application submitted by the respondent under Section 3 of the Act was premature, cannot be sustained at all.

17. I have carefully perused the orders passed by the courts below. In my view, the order passed by the learned Sessions Judge does not suffer from any illegality or irregularity. No interference is warranted as regards the quantum of maintenance as modified by the Sessions Court. Thus, having regard to the entire

facts and circumstances, and also having perused the materials on record, I find no merit in any of the contentions raised by the petitioner. The questions posed above are answered in the negative.

The revision petition is dismissed.

(A.K. Basheer)
Judge .

Kav/